

Department of Conservation

MAINE LAND USE REGULATION COMMISSION

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**RULES FOR THE
CONDUCT OF PUBLIC HEARINGS**

CHAPTER 5 OF THE COMMISSION'S RULES

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CHAPTER 5
RULES FOR THE CONDUCT OF PUBLIC HEARINGS

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CHAPTER 5 RULES FOR THE CONDUCT OF PUBLIC HEARINGS

5.01 Scope of Rules

These rules govern all public hearings before the Land Use Regulation Commission.

5.02 Requests for Hearings

It is the policy of the Land Use Regulation Commission to conduct the administration of its programs in an atmosphere of public understanding and cooperation and in a manner responsive to the public interest. Accordingly, the Commission shall provide the applicant, the petitioner, or any other interested person the opportunity to request a public hearing on any application, petition, or other proposal pending before the Commission. Chapter 4 of these rules contains procedures by which hearings may be requested.

5.03 Consolidation

On motion and for good cause shown, or on its own initiative, the Commission may consolidate two or more proceedings if it finds that such action will be conducive to just and proper dispatch of its business and that opportunities for public participation will not be compromised.

5.04 Notice

Notice of all public hearings before the Land Use Regulation Commission shall be governed by Chapter 4 of these rules.

5.05 Location and Attendance

- (1) **Hearing Locations:** All hearings of the Land Use Regulation Commission shall be held in a location and at a time determined by the Commission to be appropriate when considering the needs, costs and convenience of the interested parties together with those of the Commission.
- (2) **Attendance at Hearings:** A hearing on a permit application must be attended by at least one Commission member. In proceedings involving rulemaking and amendment or adoption of district boundaries and district standards, at least 3 Commission members must be present at the hearing.

5.06 Presiding Officer

- (1) **Designation of Presiding Officer:** The Presiding Officer at any hearing shall be either:
 - (a) The Chair, if present and willing to preside;
 - (b) A Commissioner selected by those members present at the hearing; or

- (c) If no Commissioner is present or willing to preside, a qualified employee or representative of the Land Use Regulation Commission, as designated by the Chair.

(2) Authority of Presiding Officer: The Presiding Officer shall have the authority to:

- (a) Require and administer oaths or affirmations;
- (b) Rule upon issues of procedure and admissibility of evidence;
- (c) Regulate the course of the hearing, set the time and place of continued hearings, and fix the time for filing of evidence, briefs and other written submissions;
- (d) Certify questions to the Commission for its determination; and
- (e) Take other actions, on behalf of the Commission consistent with these regulations and applicable statutes, as may be ordered by the Commission or that are necessary for the efficient and orderly conduct of the hearing.
- (f) To the extent permitted by law, where good cause appears, the Presiding Officer may permit deviation from the procedural rules of the Commission insofar as compliance therewith is found to be impractical or unnecessary and the change does not prejudice any of the parties.

5.07 Conferences

- (1) Prehearing Conferences without Intervenor:** At the request of a permit applicant or rezoning petitioner, the staff may confer with the applicant concerning the nature and types of information and testimony which the applicant will be expected to present at the hearing. Any conference is held for the benefit of the applicant and does not bind the Commission to matters discussed therein, nor limit the ability of the Commission to raise further issues at the hearing.
- (2) Prehearing Conferences with Intervenor or Requests for Intervention:** The Presiding Officer or the staff may, upon notice to the applicant or petitioner, to any parties intervening pursuant to Section 5.13 of these regulations and to any other persons the Commission or the Presiding Officer deems appropriate, hold conferences and issue procedural orders for the purpose of formulating or simplifying the issues, obtaining admissions of fact and of documents, arranging for the submission of proposed exhibits or written testimony, limiting the numbers of witnesses, consolidating the examination of witnesses, consolidating parties or specifying procedures in connection with the hearing, and such other matters which may expedite the orderly conduct and disposition of the proceedings.
- (3) Recording of Conferences:** The actions taken at or following any such conference and any agreements or orders arising there from shall be stated on the record by the Presiding Officer, including without limitation in a procedural order, and any person may ask questions about or raise objections to such actions at the time they are stated.

5.08 Conduct of the Hearing

- (1) **Opening Statement:** The Presiding Officer shall open the hearing by describing in general terms the purpose of the hearing and the general procedure governing its conduct.
- (2) **Recording of Testimony; Report to Commission:** All testimony at hearings before the Commission must be recorded and may, as necessary, be transcribed.

If the hearing is conducted by a single commissioner or qualified employee or representative, the commissioner, employee or representative shall report the findings of fact and conclusions to the Commission together with a transcript of the hearing and all exhibits. The findings of fact and conclusions become part of the record. The Commission is not bound by the findings or conclusions when acting upon the record, but shall take action, issue orders and make decisions as if it had held and conducted the hearing itself.

- (3) **Witnesses:** Witnesses shall be sworn. Witnesses may be compelled to attend, testify and produce records if subpoenaed by the Commission. Witnesses will state for the record their name, residence, business or professional affiliation, if any, and whether or not they represent another individual, firm, association, organization, partnership, trust company, corporation, state agency or other legal entity for the purpose of the hearing.
- (4) **Testimony in Written Form:** At any time prior to or during the course of the hearing, the Presiding Officer may require that all or part of the testimony to be offered at such a hearing be submitted in written form. Any written testimony shall be submitted and be in such form and at such time as the Presiding Officer may specify. All persons offering testimony in written form shall be available for cross-examination as provided in Section 5.16 of these rules. Testimony offered in written form shall be available for public inspection. The person submitting the written testimony may be required within a specified time to serve a copy thereof on the applicant or petitioner, on all intervenors and on any other person whom the Presiding Officer deems appropriate.

This rule shall not be construed to prevent oral testimony at a scheduled hearing by a member of the public who is not affiliated with a party required to file testimony in writing and who requests and is granted time to testify at a hearing.

- (5) **Continuance; Multiple Hearings on Matter:** All hearings conducted pursuant to these rules may be continued and reconvened from time to time and from place to place by the Presiding Officer as circumstances require. Any hearing may also be convened in multiple hearing sessions, on multiple dates and in multiple locations, in the interest of providing the public with an opportunity to be heard across the Commission's jurisdiction. When the Commission elects to hold multiple public hearings on any matter, either by continuance of a hearing or by holding multiple scheduled hearing sessions, all hearings within a 45-day period are considered one hearing for administrative purposes. All orders for continuance shall specify the time and place at which such hearing shall be reconvened, or shall set forth the manner in which such information may be later publicized by the Commission and obtained by interested persons. The Presiding Officer shall give notice to interested persons and the public in such a

manner as is appropriate to insure that reasonable notice will be given of the time and place of such reconvened hearing.

5.09 Regulation of Certain Devices

The placement and use of television cameras, still cameras, motion picture cameras, tape recorders, microphones or similar devices at Commission hearings may be regulated by the Presiding Officer in a manner consistent with the provisions of 1 M.R.S.A. § 401 et seq.

5.10 Subpoenas

- (1) **Who May Request Subpoenas:** At the request of any party, or at the request of the Commission, or any member thereof, or on his/her own motion, the Presiding Officer may issue subpoenas for the attendance of witnesses or for the production of documents.
- (2) **Content:** Every subpoena so issued shall bear the name of the Commission, the name of the issuing officer, and shall command the person to whom it is directed to attend and give testimony or produce specified documents or things at a designated time and place. The subpoena shall require the approval of the Attorney General or his/her designee. The subpoena shall also advise of the quashing procedure provided by subsection 5 herein.
- (3) **Service:** Unless receipt of the subpoena is acknowledged by the witness, it shall be served by a person who is not a party to the proceeding and is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named in it and tendering to him/her the fees and mileage paid to witnesses in the Superior Courts of this State.
- (4) **Proof of Service:** The person serving the subpoena shall make proof of service, by filing the subpoena and affidavit or acknowledgment of service with the Presiding Officer. Failure to make such proof of service shall not affect the validity of such subpoena and service.
- (5) **Quashing:** On motion made promptly, and in any event before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the Presiding Officer may:
 - (a) Quash or modify the subpoena if he/she finds that it is unreasonable or requires evidence not relevant to any matter in issue; or
 - (b) Deny the motion to quash.
- (6) **Confidentiality:** If any person served with such subpoena claims, at or before the hearing, that the production of books, records or other data under such person's control may disclose secret processes, formulae or methods used by or under the direction of such person, which are entitled to protection as trade secrets or as to which the confidentiality is otherwise entitled to protection by law, and the Presiding Officer determines that such claim is valid after consultation with a representative of the Attorney General, such information from such books, records, or other data shall be disclosed at a nonpublic portion of the hearing and the record thereof shall be confidential.

- (7) **Court Orders:** If any person refuses to obey a subpoena issued by the Commission under this section, the Commission may apply to any Justice of the Superior Court for an order compelling such person to comply with the requirements of the subpoena and for such other relief as the law may allow.
- (8) **Costs:** Any costs incident to complying with a subpoena shall be borne by the party requesting the subpoena.

5.11 Evidence

- (1) **Admissible Evidence:** Evidence shall be admissible if it is relevant and material to the subject matter of the hearing and is of a type customarily relied upon by reasonable persons in the conduct of serious affairs. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded. Notwithstanding subsection 2 of this section, the Commission's experience, technical competence and specialized knowledge may be utilized in the evaluation of all evidence submitted to the Commission.
- (2) **Official Notice:** The Commission may, at its discretion and at any time, take official notice of any facts of which judicial notice could be taken, including relevant statutes, regulations, transcripts of other hearings, non-confidential agency records, generally recognized facts of common knowledge to the general public, and physical, technical or scientific facts.

In a hearing of the type described in Section 5.16(1) of these regulations, the Commission shall include in its final decision those facts of which it took official notice, unless those facts are included in the recording of the proceedings.

- (3) **Documentary and Real Evidence:** All documents, materials and objects offered in evidence as exhibits shall, if accepted, be numbered or otherwise identified. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. The Presiding Officer may require that any person offering documentary or photographic evidence shall provide the Commission with a specified number of copies. Any documentary or real evidence shall be produced, compiled and submitted by the person offering the same, who shall not request the Commission or its staff to produce or compile the same on his behalf. In a hearing of the type described in Section 5.16(1) of these regulations, the applicant or petitioner, intervening parties, and state, federal or municipal agencies shall provide each other with copies of any exhibit offered in evidence unless otherwise ordered by the Presiding Officer. All documents, materials and objects admitted into evidence shall be made available during the course of the hearing for public examination. All such evidence will also be available for public examination at the Commission's primary office during normal business hours.
- (4) **Objections:** All objections to rulings of the Presiding Officer and the grounds therefore shall be timely stated. If, during the course of or after the close of the hearing and during its deliberations, the Commission determines that the ruling of the Presiding Officer was in error, the Commission may reopen the hearing or take such other action as it deems appropriate to correct such error.

5.12 Offer of Proof

An offer of proof may be made in connection with an objection to a ruling of the Presiding Officer excluding or rejecting any testimony, evidence, or questions on cross-examination. Such offer of proof shall consist of a statement of the substance of the proffered evidence which is expected to be shown.

5.13 Intervention

- (1) **Petition for Intervention:** Prior to the commencement of any public hearing of the type described in Section 5.16(1) of these regulations, the Commission may require or allow any person who desires to participate as a party, offer testimony and evidence, and participate in oral cross-examination to file a petition under oath or affirmation for leave to intervene. Notice of the requirement of filing a petition for intervention shall be given in a manner consistent with Section 4.04(7) of these regulations or in such other manner as the Presiding Officer deems appropriate. A petition to intervene shall be granted if it demonstrates that the petitioner is or may be substantially and directly affected by the proceeding.

The Commission may further allow any other interested person to intervene as a party or to participate in more limited manner as the Commission or its Presiding Officer may designate.

A petition for leave to intervene must be filed by the date specified by the Commission or the Presiding Officer or, if an earlier date is not specified, by the date of the public hearing. A petition to intervene which is not timely filed will be denied unless the petitioner shows good cause for failure to file on time. A person permitted to intervene shall become a party to the proceeding and shall be permitted to participate in all phases of the hearing, subject, however, to such limitations as the Commission or Presiding Officer may direct. Petitioners may be required to consolidate or join their appearances in part or in whole if their interests or contentions are found to be substantially similar and such consolidation would expedite or simplify the hearing without prejudice to the rights of any party or petitioner. A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding or with respect to any one or more issues or purposes thereof.

- (2) **Duration of Intervenor Status:** Unless otherwise specified by the Commission, intervenor status shall be deemed to have been granted for the duration of the proceeding. Any applicant or petitioner whose proposal is approved shall be required to provide notice to any intervenors of the filing of any documents presented to the Commission indicating actions taken to comply with the conditions attached to the approval or of proposals to vary or amend approved activities, provided, however, that the applicant's responsibility under this subsection shall be deemed fulfilled when such notice has been mailed to the person designated to represent an intervenor in the petition for intervention.
- (3) **Denial of Intervenor Status:** When a petition to intervene is denied, the Commission shall include in the record of the hearing an entry to that effect and the reasons therefore.

- (4) **Legal Counsel:** Nothing in this regulation shall be construed to require or prevent representation by legal counsel in order for a person to be granted intervenor status or otherwise participate before the Commission.
- (5) **Copies:** The applicant or petitioner shall provide each person granted intervenor status pursuant to this section with a copy of the application or petition and any amendments thereto.

5.14 Participation by Interested Persons

Any person may, in the discretion of the Presiding Officer, be permitted to make oral or written statements on the issues, introduce documentary, photographic and real evidence, attend and participate in conferences and submit written or oral questions of other participants, within such limits and on such terms and conditions as may be fixed by the Commission or the Presiding Officer.

5.15 Governmental Agencies

Governmental agencies may notify the Commission of their anticipated participation in any hearing in the form and manner required by Section 5.13(1). Such governmental agencies shall, upon having filed such notice, be entitled to all rights of an intervenor in such proceedings. Representatives of governmental agencies may participate in their official capacity only if representing the views of the agency on whose behalf they appear, and not personal views and opinions. Government agencies may still provide testimony at the hearing without filing a notice under this section.

5.16 Testimony and Questions

- (1) **Hearings on permit applications or petitions for a change in district boundaries:** In those hearings concerned with a permit application pursuant to 12 M.R.S.A. § 685-B(4) or with a petition for variance or special exception pursuant to 12 M.R.S.A. § 685-A(10) or with a petition for the change of land use district boundaries pursuant to 12 M.R.S.A. § 685-A (7-A), testimony shall be offered as follows:

- (a) Direct Testimony:

Direct Testimony shall be offered in the following order:

- (i) The applicant or petitioner and such representatives and witnesses as he/she selects;
- (ii) Governmental agencies and representatives thereof;
- (iii) Intervenors; and
- (iv) Other interested persons

The staff of the Commission and its representatives and consultants may offer testimony at any time.

(b) Cross-Examination and Questions:

At the conclusion of the testimony of each witness, the Commissioners, staff and consultants, Federal and State and other governmental representatives, the applicant or petitioner, and intervenors shall have the right of oral cross-examination. Cross-examination shall be conducted in the following order:

- (i) Commissioners, counsel, staff members and consultants may be permitted, by the Presiding Officer, to ask questions at any time;
- (ii) The applicant or petitioner;
- (iii) Intervenors;
- (iv) Federal, State and other governmental representatives.

(c) Redirect and Rebuttal Evidence:

- (i) A person who has concluded his/her presentation cannot thereafter introduce further evidence except in rebuttal, unless by leave of the Presiding Officer. Rebuttal evidence shall be directed only to matters brought out by another person, except by leave of the Presiding Officer.
- (ii) All parties shall have the right to redirect and re-cross-examination of any witness, unless otherwise directed by the Presiding Officer. Such re-examination shall be limited to matters brought out in the last examination by any other person, except by leave of the Presiding Officer.

(d) Varying Order of Appearance:

When circumstances warrant, the Presiding Officer may vary the order in which witnesses appear and the order or manner in which testimony is given or witnesses cross-examined.

- (2) **All other hearings:** In all other hearings, testimony may be offered first by the staff and then by any interested persons in such order and on such conditions as the Presiding Officer may designate.

5.17 Oral Argument

For hearings conducted under Section 5.16(1), oral argument may be permitted before the Commission at the conclusion of the evidence or at a time and place fixed by the Presiding Officer, at his/her discretion

5.18 Closure of the Hearing

- (1) **Closure of the hearing record:** Except as provided in Sections 5.20 and 5.21, of these rules, after final closure of the public hearing, including any period when the record

remains open as provided in this section or as directed by the Presiding Officer, no further evidence will be allowed into the record.

- (2) **Time periods for written comments after the conclusion of a hearing:** After the conclusion of a hearing the record will remain open for:
 - (a) A period of 10 days for the purpose of allowing interested persons to file written statements with the Commission; and
 - (b) A period of seven (7) additional days for the purpose of allowing interested persons to file statements in rebuttal of those filed pursuant to Section 5.18,(2)(a) above.
- (3) **Reopening a hearing prior to a decision:** Prior to issuance of a final order or decision, the Commission may elect to reopen a hearing and extend the time period for public comment in compliance with Chapter 4 of these rules.
- (4) **Final closure:** The date of final closure of the hearing record, including any extension of the open record or reopening of the hearing or record, constitutes final closure of the public hearing and the final date by which data, views or arguments may be submitted to the Commission for consideration in acting upon an application or petition or in adopting the rule.

5.19 Record

The record of the hearing shall consist of all applications, petitions, motions, preliminary and introductory rulings and orders, the recording of the hearing or the transcript, all exhibits or written testimony submitted at the hearing or pursuant to Section 5.18 of these regulations, any other evidence received or considered, all briefs and proposed findings and comments thereon, the findings of fact and conclusions of the Presiding Officer, any facts officially noticed, any offers of proof, objections and rulings thereon, and all staff memoranda to the Commission together with the decision or order of the Commission.

5.20 Petition for Correction in Regard to Permit Application or Rezoning Petition

Within 30 days after receipt of any decision concerning a permit application or rezoning petition following a hearing, any person aggrieved by the decision or order of the Commission may petition to seek the correction of any misstatement of fact or clerical error contained in the final decision or to challenge any material fact of which the Commission took official notice. The Commission shall determine whether to dismiss the petition as without merit, to correct the error, to reopen the hearing pursuant to Section 5.21 herein, or to take such other steps as it deems appropriate. Failure to invoke the provisions of this section shall have no effect upon an aggrieved party's right of appeal to a court of law.

5.21 Reopening the Hearing after Decision on Permit Application or Rezoning Petition

- (1) Within 30 days after the Commission has rendered a decision on a permit application or a rezoning petition following a hearing, any person aggrieved by such decision or order may petition the Commission to reopen the hearing for the purpose of introducing new

evidence with regard to any provision of such order or decision. The petitioner shall deliver or mail a copy of any such petition simultaneously to any other party to the proceeding. Upon receipt of such petition, the Commission shall consider the offer of evidence contained therein and determine whether to dismiss the petition as offering no material evidence not already before the Commission or to reopen the hearing. Upon reopening the hearing, the Commission shall amend its original order only if new evidence is presented to support such amendment. Failure to invoke the provisions of this section shall have no effect upon an aggrieved party's right of appeal to a court of law.

- (2) Within (7) seven days of the filing of a petition to reopen hereunder, any other interested person may file an answer in opposition to the petition

5.22 Copies of the Record

Where available, a transcript of the testimony of any hearing and copies of evidentiary materials may be purchased directly from the independent official Commission reporter, if any, or if necessary, through the Commission, provided that no undue burden is placed upon the Commission in responding to such request, and further provided that such materials are in a form or size susceptible of reproduction by photocopying or similar means.

5.23 Forms

All motions, proposed findings, petitions, briefs, and, to the extent practicable, written testimony filed within the Commission (except for documents not susceptible of reproduction in the manner herein provided or for other good cause shown) shall be typewritten or printed on white opaque paper 8 1/2 x 11 inches in size. Typed matter shall be double spaced. The first page of each such document shall be headed by the title:

STATE OF MAINE

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and shall have a caption with:

- (1) The title of the matter, giving the name of the applicant, the action in issue and the location;
- (2) The Commission's application number; and
- (3) The title of the document (e.g. Petition to Intervene).

The final page shall be dated and signed.

5.24 Service and Filing of Documents

- (1) **Service:** Unless the Presiding Officer otherwise provides, any person submitting any notices, motions, petitions, briefs, written testimony or testimony pursuant to Section 5.18, permitted or required to be filed with the Commission pursuant to these regulations (except

briefs or proposed findings prepared by the Commission or staff, its consultants or counsel), shall serve such documents upon all applicants or petitioners and intervenors in the proceeding or their representatives.

- (2) **Filing:** Unless the Presiding Officer otherwise provides, an original and (9) nine copies of all motions, petitions, briefs and prefiled testimony shall be filed with the Commission.
- (3) **Representatives:** The first document filed by any person in a proceeding shall designate the name and address of a person on whom service shall be made and to whom all correspondence from the Commission and staff shall be sent.

5.25 Ex parte Communications

- (1) **Limitations of this section:** This section shall apply to those public hearings concerned with the adoption of district boundaries pursuant to 12 M.R.S.A. § 685-A.(7-A); the amendment of district boundaries pursuant to 12 M.R.S.A. § 685-A.(8-A); permit applications pursuant to 12 M.R.S.A. §685-B; petitions for the granting of a variance or issuance of special exception permit pursuant to 12 M.R.S.A. § 685-A.(10); and any public hearing in which the legal rights, duties, or privileges of specific persons are to be adjudicated.
- (2) **Prohibitions on ex parte communications:** After a decision by the Commission to conduct a public hearing, no Commission member shall engage in any ex parte communication in connection with any issue of fact, law or procedure which is the subject of the hearing.
- (3) **Allowable communications:** However, this section shall not prohibit any Commission member from:
 - (a) Communicating in any respect with other members of the Commission or the Presiding Officer;
 - (b) Having the aid and advice of members of the staff, counsel or consultants retained by the Commission; provided that, in adjudicatory proceedings subject to 5 M.R.S.A. Section 9051 et seq, this exception shall extend only to consultation with members of the staff, counsel or consultants who have not participated and will not participate in the proceeding in an advocate capacity.
- (4) **Actions considered as ex parte communication:** For purposes of this section, "ex parte communication" shall include, but not be limited to, oral communication (other than public communication occurring upon notice to all parties and during a properly scheduled public hearing or meeting of the Commission) or any written communication (other than motions, prefiled testimony or other writings, copies of which are furnished or available, as required herein, to all other parties to the proceeding).
- (5) **Disclosure of ex parte communication:** In the case of an ex parte communication prohibited by this section, the Commission member or Presiding Officer involved therein shall disclose the nature and substance of the communication to the Commission members and parties to the proceeding, but he shall not be disqualified from voting in connection

with the proceeding but the Commission may provide an opportunity to the other parties to the proceeding to respond to the matter communicated.

Such disclosure shall be made part of the public record, but the substance of the ex parte communication shall not form a basis for the Commission's decision unless other parties to the proceeding have been given an opportunity to respond.

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